No. 82-1355

In the Supreme Court of the United States

OCTOBER TERM, 1982

CORNELIA DEROIN YELLOWFISH, ET AL., PETITIONERS

v.

CITY OF STILLWATER, OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357, authorizing condemnation of lands allotted to Indians, and the Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.*, authorizing the Secretary of the Interior to grant rights-of-way over Indian lands under specified conditions, provide alternative means of obtaining rights-of-way over allotted Indian lands.

2. Whether the United States, by taking the position that the statutes do not provide alternative means of obtaining rights-of-way, breached its trust responsibilities to petitioners, thereby requiring that the action to condemn the rights-of-way be dismissed for lack of the "effective" presence of the United States as trustee of the allotted condemned lands.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 691 F.2d 926. The opinion and order of the district court (Pet. App. 15-19) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982. A petition for rehearing was denied on November 12, 1982 (Pet. App. 13-14). The petition for a writ of certiorari was filed on February 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357, and the Rights-of-Way Act of 1948, 25 U.S.C. 323 through 328, are set out at Pet. 2-4.

STATEMENT

1. On May 21, 1981, the City of Stillwater, a political subdivision of the State of Oklahoma, filed a petition in federal district court to condemn easements over the trust allotments of the nine Indian petitioners and other Indians in Noble County, Oklahoma, for the purpose of constructing a municipal water supply pipeline. Jurisdiction was based on Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357. The United States was joined as a defendant because the allotments under condemnation were initially issued pursuant to the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, with legal title to the land retained in the United States as trustee (Pet. App. 1).

The Bureau of Indian Affairs sent letters to each of the 110 allottee defendants informing them that they could choose to be represented in this condemnation action by the United States Attorney. The nine Indian petitioners, instead, retained private counsel (Pet. App. 3). They filed answers and a motion to dismiss, disputing both the City's power to condemn the easements and the district court's jurisdiction over the condemnation proceedings. They claimed that the Rights-of-Way Act of 1948, 25 U.S.C. 323-328, repealed and superseded 25 U.S.C. 357 thereby making the acquisition of the easements unlawful unless consent by the allottees and/or the Secretary of the Interior was first obtained pursuant to the 1948 Act (Pet. App. 2-3).

2. The district court concluded that 25 U.S.C. 357 was not repealed by implication and, therefore, denied petitioners' motion to dismiss. Although the court certified its interlocutory order for appeal pursuant to 28 U.S.C. 1292(b), it declined to stay the proceedings pending resolution of the appeal. The district court denied a plea to forbid the City from entering into possession of the condemned allotments in order to construct the water pipeline (Pet. App. 18-19).

On July 10, 1981, petitioners filed a petition for permission to take an interlocutory appeal from the district court's order, and a motion for a stay pending appeal. On July 27, 1981, the court of appeals, over the opposition of the United States, granted permission to take the interlocutory appeal, but denied the stay pending appeal (Pet. App. 4; Pet. 5-6).

On August 18, 1981, petitioners filed a motion requesting the court of appeals to consider whether the United States was adequately representing its Indian beneficiaries in accordance with its trust responsibilities. On September 16, 1981, the United States submitted its response, stating that the decision to support the continuing validity of 25 U.S.C. 357 was made by the Secretary of the Interior in the best interest of the Indian beneficiaries. Attached to the response was a copy of a letter dated September 15, 1981, which was sent to each allottee defendant in the case explaining the litigating position of the United States, and again advising the allottees of their right to choose counsel other than the United States Attorney if they so desired (Pet. 6; App., *infra*, 1a-3a).

3. On April 28, 1982, the court of appeals issued its decision (Pet. App. 3) affirming the trial court's holding that federal courts have jurisdiction under 25 U.S.C. 357 to condemn rights-of-way over allotted Indian land without Secretarial or Indian consent. The court also held (Pet. App. 11) that the legal position taken by the United States in support of the condemnation power is a reasonable and permissible exercise of judgment consistent with the United States' duties as trustee for the Indians.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, it resolves the first question presented precisely as the Ninth Circuit did in *Southern California Edison Co.* v.

Rice, 685 F.2d 354 (1982), cert. denied, No. 82-873 (Mar. 28, 1983). Accordingly, further review by this Court is not warranted.

1. Petitioners' principal argument (Pet. 7-17) is that rights-of-way across allotted Indian lands are now governed by the Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.*, and that 25 U.S.C. 357, upon which the City of Stillwater relied, remains applicable only to non-right-of-way situations, such as the condemnation of an entire allotment. In our view, however, the 1948 Act and 25 U.S.C. 357 form a unified statutory scheme for acquiring rights-of-way over allotted Indian land. A state-authorized condemnor may proceed under either statute to obtain a right-of-way over allotted lands. The potential condemnor may apply to the Secretary of the Interior for a right-of-way under the 1948 Act, provided the consent of the allottees is obtained,[1] or he may proceed under 25 U.S.C. 357 to condemn the right-of-way.

In *United States* v. *Minnesota*, 113 F.2d 770, 773 (1940), the Eighth Circuit, rejecting the argument that 25 U.S.C. 357 was modified by the requirement of secretarial consent to rights-of-way under Section 4 of the Indian Appropriations Act of 1901, 25 U.S.C. 311, explained why Congress could reasonably intend that rights-of-way might be acquired by either condemnation or grant from the Secretary (113 F.2d at 773):

> The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highway. Section 3, 25 U.S.C.A. § 357, authorizes the maintenance of condemnation proceedings. Ordinarily, the owner of a fee title to real estate may

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[1]There are four exceptions to this consent requirement. See 25 U.S.C. 324.

> grant a right of way over his land, but although the allottee is vested with fee title, his right of alienation is restricted, and hence, it would not be possible to secure a right of way from such allottee by purchase, however desirable it might be, and however advantageous to the allottee. By Section 4 of the Act, 25 U.S.C. A. § 311, the Secretary of the Interior is authorized to grant permission for the opening and establishment of a public highway through lands allotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, * * * neither dependent upon the other.

Accordingly, petitioners misapprehend the relationship between 25 U.S.C. 357 and the 1948 Act in arguing (Pet. 7) that the protective provisions of the 1948 Act will be nullified if rights-of-way may be obtained by condemnation. The powers of the Secretary and the allottee under the 1948 Act arise only when the entity acquiring the right-of-way attempts to obtain the right-of-way by purchase, not when it elects to condemn the interest. Compare the 1948 Act, 25 U.S.C. 323 *et seq.*, with 25 U.S.C. 357.[2]

Petitioners also err in suggesting (Pet. 12) that the question of the relationship between the two statutes is a "long-standing troublesome issue of statutory construction." In addition to the Eighth Circuit decision in *United States* v. *Minnesota, supra*, holding that condemnation is an alternative method for acquiring rights-of-way across allotted Indian land, the other courts of appeals addressing the question have uniformly held, as the Tenth Circuit did here,[3] that 25 U.S.C. 357 and the 1948 Act provide

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[2]As the court of appeals properly recognized (Pet. App. 11), other—judicial—safeguards are afforded when the right-of-way is acquired through condemnation.

[3]The court of appeals properly noted (Pet. App. 9-10) that 25 U.S.C. 357 is still in force. The court found it persuasive that in 1976 Congress

alternative, independent methods of obtaining easements across allotted land. *Southern California Edison Co.* v. *Rice, supra*, 685 F.2d at 357; *Transok Pipeline Co.* v. *Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614, 617-618 (9th Cir. 1959). The single contrary decision by the district court in Nebraska (Pet. 10), presently on appeal to the Eighth Circuit and presumptively subject to reversal in light of that court's ruling in *United States* v. *Minnesota, supra*, does not undermine the force of the consistent determinations of three courts of appeals. Although this Court has never decided the issue, that does not of course require an exercise of certiorari jurisdiction in the absence of a conflict among the courts of appeals.

Petitioners stress (Pet. 8-10) that Congress' establishment of a new policy for Indian lands in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. 461 *et seq.*, and the 1948 Act, repudiated the allotment policies upon which 25 U.S.C. 357 was predicated. On this basis, they argue that, consistent with the new policy of affording Indians greater control over their lands, the 1948 Act should be construed as displacing 25 U.S.C. 357, with respect to acquisition of rights-of-way.

The fact remains, however, that prior to 1934 thousands of allotments had been approved and the IRA did not eviscerate these allotments. Furthermore, it is anomalous to argue, as petitioners do, that allottees must invariably have the power to prohibit rights-of-way across their allotments, as a means of controlling their destinies, while at the same time effectively conceding that the entire fee interest in

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extended operation of 25 U.S.C. 357, and reemphasized the applicability of the 1948 Act to the Pueblo Indians of New Mexico. See Act of Sept. 17, 1976, Pub. L. No. 94-416, Section 3, 90 Stat. 1275. Accord: *Southern California Edison Co.* v. *Rice, supra*, 685 F.2d at 356.

every allotment may be condemned without the consent of the allottees. 25 U.S.C. 357 was, and still is, a necessary tool for accommodating the requirements of state and local governments to the remaining allotments (Pet. App. 10). As this Court in 1943, well into the new era, explained:

> Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress has intended this it would have made its meaning clear.

United States v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 211 (1943). Although in *Oklahoma Gas* this Court was describing why a restrictive interpretation of Section 4 of the Indian Appropriations Act of 1901, 25 U.S.C. 311, was not required to protect the Indians, the reasoning applies equally to 25 U.S.C. 357. See Pet. App. 10.

Petitioners' further contention (Pet. 13-14), that the Tenth Circuit's decision in this case conflicts with its earlier decision in *Plains Electric Generation & Transmission Cooperative, Inc.* v. *Pueblo of Laguna*, 542 F.2d 1375 (1976), is similarly flawed.[4] In *Plains Electric* the court held that the Act of May 10, 1926, ch. 282, 44 Stat. 498, no longer authorized condemnation of rights-of-way over *tribal* lands of the Pueblo at Laguna because the Act had been repealed by the Act of Apr. 21, 1928, ch. 400, Section 1, 45 Stat. 442, now codified at 25 U.S.C. 322, and the 1948 Act. *Plains Electric, supra*, 542 F.2d at 1381. As the court of appeals in

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[4]Even if there were merit to this claim, an intracircuit conflict is for the court of appeals, not this Court, to resolve. Cf. *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

this case properly noted (Pet. App. 6-7), however, *Plains Electric* is distinguishable because "Section 357 authorizes condemnation of *allotted* land, while the 1926 Act allowed condemnation of lands *communally owned* by the Pueblo Indians" and, accordingly, *Plains Electric* "is silent on the subject of allotted lands." [5] This Court recognized in *United States* v. *Oklahoma Gas & Electric Co., supra*, 318 U.S. at 214, that Congress has drawn "a clear distinction between reservations and allotted lands." [6]

2. There is no merit in petitioners' further argument (Pet. 18-22) that the position taken by the United States in this litigation—that rights-of-way across Indian allotments may be condemned pursuant to 25 U.S.C. 357—is not authorized by that provision and constitutes a breach of the trust duties imposed on the United States by the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* and the 1948 Act.

Whatever the nature of the United States' fiduciary obligations under the General Allotment Act of 1887 and the 1948 Act, this Court's decision in *United States* v. *Mason*, 412 U.S. 391 (1973), makes plain that where, as here, the litigating position of the United States, as trustee, is based on directly relevant judicial decisions there is no breach of

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[5]The court below also correctly recognized (Pet. App. 6 n.5) that the *Plains Electric* court found persuasive legislative history of the 1928 Act reflecting congressional intent to completely substitute that Act for the 1926 Act. See *Plains Electric, supra*, 542 F.2d at 1377-1379. In contrast, petitioners here have cited nothing in the legislative history of the 1948 Act to indicate congressional intent to repeal or modify 25 U.S.C. 357.

[6]See also, *e.g.*, 318 U.S. at 211-215; *United States* v. *10.69 Acres of Land in Yakima County*, 425 F.2d 317, 319-320 (9th Cir. 1970); *United States* v. *Minnesota, supra*, 113 F.2d at 773.

The Ninth Circuit in *Southern California Edison Co.* v. *Rice* also found *Plains Electric* inapposite on the ground that it involved communally owned, rather than allotted, land. 685 F.2d at 357.

trust duties. In *Mason*, administrators of an estate including allotted trust property argued that the United States breached its fiduciary duties in failing to challenge assessment of state taxes against the estate, notwithstanding a decision of this Court directly supporting the United States' position. 412 U.S. at 392. The Court first noted that in such cases the trustee has a "broad discretion" whether to litigate or pay the taxes, so long as the decision is "not wholly unreasonable." *Id.* at 398-399. In view of the controlling precedent, however, the Court then went on to reject the administrators' claims more forcefully:

> [W]e therefore deal here with an assertion of taxing authority which was not merely plausible but had been expressly approved by a decision of this Court. Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts. * * *
>
> [I]f the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance.

412 U.S. at 399-400. Under *Mason*, the United States was clearly entitled in this case to rely on the unanimous determination of all courts of appeals addressing the issue that condemnation pursuant to 25 U.S.C. 357 is an alternative means of acquiring rights-of-way across allotted Indian land.[7] It follows that the United States, in supporting this determination, acted with the requisite care and prudence and did not breach its trust responsibilities.

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[7]Petitioners' contention (Pet. 21-22) that, at least in the Tenth Circuit, the question was "unsettled" is plainly wrong. Whatever inferences contrary to the position of the United States might have been drawn from the Tenth Circuit's 1976 decision in *Plains Electric*, *supra*, which

Petitioners' contention that the General Allotment Act of 1887 and the 1948 Act create duties that the United States, as trustee, breached is untenable. Even if the interest of the United States in preventing "improvident alienation" of allotted lands, *United States* v. *Oklahoma Gas & Electric Co., supra*, 318 U.S. at 213, could have been said to posit a duty to prevent state-authorized condemnation of allotments when the General Allotment Act was enacted in 1887, that duty was clearly modified by the subsequent enactment of 25 U.S.C. 357 which explicitly authorizes condemnation of allotments.[8] As for petitioners' suggestion that the

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dealt with condemnation of tribal, rather than allotted lands, and with the Act of May 10, 1926, ch. 282, 44 Stat. 498, rather than 25 U.S.C. 357, such inferences were necessarily dispelled by the court's 1977 decision in *Transok Pipeline Co.* v. *Darks, supra*, 565 F.2d at 1153, which is squarely on point.

[8]Notwithstanding petitioners' suggestion (Pet. 19), *Minnesota* v. *United States*, 305 U.S. 382 (1939), does not indicate that the United States has a duty to prevent condemnation of allotments. To the contrary, the case suggests that the interest of the United States is "implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds." *Southern California Edison Co.* v. *Rice, supra*, 685 F.2d at 356; see *Minnesota* v. *United States, supra*, 305 U.S. at 388. Furthermore, the very existence of 25 U.S.C. 357 indicates that there is a federal interest in permitting state-authorized condemnation of allotted lands. Consistent with this determination, the Secretary of the Interior properly explained, and the court of appeals noted (Pet. App. 12), that, if condemnation were not permitted, a single allottee could prevent acquisition of rights-of-way needed for roads or water and power lines, improvements that benefit Indian allottees as much as they benefit others.

Contrary to petitioners' allegations (Pet. 20), *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), does not suggest that there is invariably an "antagonism between the power to condemn and the duties of a trustee." Rather, in *Sioux Nation* this Court approved the statement by the Court of Claims that " 'where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, * * * [t]his is a mere substitution of

United States is required to impose protective conditions on acquisition of rights-of-way, as we have already discussed, such duties would arise only when the acquiring entity attempts to secure a right-of-way by grant from the Secretary under the 1948 Act, not when it elects to condemn the right-of-way under 25 U.S.C. 357. Accordingly, the United States has breached no duties imposed by these statutes.

At all events, even if one assumes, *arguendo*, that the United States breached its fiduciary duties by not arguing that 25 U.S.C. 357 has been repealed by implication, it is difficult to see how petitioners in this case have been harmed by the government's stance. Indian allottees have the capacity to sue and defend actions on their own behalf; when dissatisfied with the government's representation of their interests, they may choose other counsel. See *United States* v. *Mason, supra*, 412 U.S. at 399; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 368-371 (1968). Petitioners here were advised of this right (App., *infra*, 1a-3a) and took advantage of it (Pet. App. 3). Counsel of their own choosing, throughout this litigation, made the argument that 25 U.S.C. 357 has been partially repealed. Accordingly, by their own standards, petitioners were adequately represented.

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assets or change of form and is a traditional function of a trustee.' " 448 U.S. at 409; see *id.* at 416. By enacting 25 U.S.C. 357, Congress clearly made the requisite "good faith effort." It did not simply authorize the taking of allotted lands; rather, it specified that "money awarded as damages shall be paid to the allottee." 25 U.S.C. 357.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

DOJ-1983-04

APPENDIX

U.S. Department of Justice

Washington, D.C. 20530

September 15, 1981

NAME

ADDRESS

Dear :

As you should know from earlier letters from the Bureau of Indian Affairs, a right of way is being condemned over part of your land by the City of Stillwater, Oklahoma to lay waterpipes from Kaw Reservoir to Stillwater. The name and number of this condemnation case in the United States District Court for the Western District of Oklahoma is *City of Stillwater, Oklahoma* v. *An Easement and Right-of-Way for Water Pipeline Purposes Across Various Tracts of Land in Noble County, Oklahoma, as Indicated, et al.*, NO. CIV. 81-674-D.

You are one of the allottees named as a defendant in this case. The Bureau of Indian Affairs has sent you a letter telling you that you could choose to have the United States Attorney represent you as your lawyer in the condemnation trial. Some of you have sent back the letter checking the appropriate box to show that you did want the United States Attorney to represent you at this trial.

This trial determines how much money Stillwater has to pay all the landowners for the right of way. You do not have to have a lawyer to represent you at this trial. You will still

get paid for the right of way that crosses your land even if you do not have a lawyer present at the trial.

Nine of the Indian allottees, whose land is being condemned for this right of way, have chosen to be represented by lawyers from the Native American Rights Fund. The Native American Rights Fund is located at 1506 Broadway, Boulder, Colorado 80302; telephone: (303) 447-8760. These lawyers are arguing that the court does not have the power to order the condemnation of allotted land. If these lawyers win this argument for the nine allottees, then Stillwater will not be able to put its waterpipe under your land without your consent. Even if you consent, Stillwater will still have to pay you for the right of way over your land.

The United States Attorney, representing the Indian allottees who have chosen him and the Secretary of the Interior, is going to argue that the court DOES have the power to order the condemnation of the right of way over your land. If the position argued by the United States Attorney prevails, then Stillwater will be able to put its waterpipe under your land, but Stillwater will have to pay you for taking this right of way.

If you do not want the United States Attorney to represent you in this case, then you are free to get another lawyer, either a lawyer from the Native American Rights Fund, or any other lawyer you choose. You are not required to have a lawyer at all. If Raymond Sanford, Regional Solicitor, Department of the Interior, P.O. Box 3156, Tulsa, Oklahoma 74101, does not hear from you within ten days from

the date of this letter, it will be presumed that you are satisfied to have the United States Attorney represent you in this case.

Sincerely,

s/s Laura Frossard

Laura Frossard
Dirk D. Snel
Attorneys, Department of Justice
Washington, D.C. 20530